

The Department of Energy
ACQUISITION
SYSTEM

A Guide for Executives

*U.S. Department of Energy
Office of Procurement
and Assistance Management*

March 1998

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Every year the Department of Energy spends over 90% of its budget on purchases from the private sector. Because of the Federal Government's special fiduciary relationship, the acquisition system established to manage these expenditures of taxpayer monies is very different in some respects from commercial transactions between private parties. This guide provides information to understand the Department's acquisition system, to use the system effectively, and to avoid ethical and conflict of interest problems.

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PURPOSE

The principal purpose of the Department's acquisition system is to:

- **Deliver on a timely basis the best value product or service to the customer** by, for example,
 - Maximizing the use of commercial products and services.
 - Using contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform.
 - Promoting competition.
- **Maintain the public's trust** by conducting business with integrity, fairness, openness, and compliance with statutory and regulatory requirements.
- **Minimize administrative operating costs.**
- **Fulfill public policy objectives**, such as
 - Providing opportunities for small and small disadvantaged business.
 - Paying fair wages to contractor employees.
 - Protecting the environment through the purchase of energy efficient and recycled products.
 - Promoting equal employment opportunity in contractor hiring practices.

ORGANIZATION FOR ACQUISITIONS

The following are among the organizations that play critical roles in defining the Department's acquisition system and accomplishing its objectives.

The Congress votes authority to obligate funds and writes laws that govern the Federal acquisition system. Obligations are legally binding commitments, in such instruments as contracts and grants, made by Federal officials that lead to cash outlays.

The General Accounting Office is a part of the legislative branch that, among other duties, investigates agency contract management and hears protests of agency contract award decisions.

The President establishes Government-wide acquisition policies and procedures through such vehicles as executive orders.

The Office of Federal Procurement Policy, in the Office of Management and Budget, provides Government-wide direction for the Federal acquisition system, directs the Federal Acquisition Institute in training opportunities, and advises the president and Congress on acquisition matters. The Administrator, along with the heads of the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration, comprise the **Federal Acquisition Regulation (FAR) Council**, which issues and maintains the Federal Acquisition Regulation. The council is supported by the Civilian Agency Acquisition Council, of which the Department is a member, and the Defense Acquisition Regulation Council.

Regulatory agencies, such as the Department of Labor, Small Business Administration, and the Environmental Protection Agency interpret and implement statutory socioeconomic requirements related to small and small disadvantaged business, labor relations, and other matters assigned to them.

The Secretary of Energy has delegated acquisition authority to the **Procurement Executive**, the Department's senior acquisition official, who further delegates acquisition authority to the heads of field activities. These officials also oversee the exercise of acquisition authority within the Department and delegate to **contracting officers** specific written acquisition authority.

The Department's Board of Contract Appeals resolves post-award disputes between the Government and contractors.

The Department's Inspector General reviews Department programs and acquisition management, investigates potential fraud and other criminal activities, and audits the Department's management and operating contracts.

LEGAL FRAMEWORK

In 1831 (U.S. vs. Tingley), the Supreme Court declared that the Federal Government, based on sovereignty, has inherent power to contract. However, the Government's broad constitutional authority to contract is limited by statutes, common law, and administrative law.

Numerous **statutes** govern Federal acquisition. Among the basic statutes:

- The Federal Property and Administrative Services Act (41 U.S.C. 201 et seq.).
- The Armed Services Procurement Act (10 U.S.C. 2301 et seq.).
- The Small Business Act (15 U.S.C. 631 et seq.).
- The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.).
- The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301-6308).

Common law comes from decisions of courts of law.

Administrative law includes:

- Executive orders.
- Decisions of Boards of Contract Appeals, the Comptroller General, and other administrative bodies.

The Federal Acquisition Regulation (FAR) (48 CFR Ch. 1) is a single, uniform regulation that applies to most executive agencies, including the Department.

The Department of Energy Acquisition Regulation (DEAR) (48 CFR Ch. 9) implements and supplements the FAR for the Department's unique needs. Internal agency procedures are in the **Department of Energy Acquisition Guide**.

The Department of Energy Assistance Regulation (10 CFR 600) is the Department's regulation for awarding financial assistance instruments (grants and cooperative agreements). The Department awards contracts for its own use in accordance with the FAR and DEAR, and assistance instruments for a public purpose in accordance with the Department's assistance regulation. Internal financial assistance procedures are in a companion **Assistance Guide**.

CONTRACTING OFFICERS

In contracts or financial assistance instruments with the private sector,

- The Government is one party,
- The contracting officer is the Government's agent, and
- The contractor or recipient is the other party.

As the Government's agent, only contracting officers may execute, modify, or terminate a contract. Moreover, contracting officers may bind the Government only to the extent of the authority delegated in writing to them.

Responsibilities. Contracting officers are responsible for ensuring that:

- The Government obtains value from contracts.
- All requirements of law and regulation are met prior to executing an action.
- Sufficient funds are available for obligation.
- Contractors receive impartial, fair, and equitable treatment.
- Both parties comply with terms of the contract or financial assistance instrument.
- The interests of the United States are safeguarded.

Independence. Contracting officers often request advice from specialists in audit, law, engineering, and other fields. However, the contracting officer is solely responsible for the final pricing and other decisions. The recommendations and counsel of contributing specialists are advisory.

OTHER ACQUISITION OFFICIALS

Depending on such factors as the dollar value of the acquisition, contracting officers may request or receive considerable advice and assistance from the following officials.

Contract specialists may either serve as contracting officers or support them. Contract specialists are trained in acquisition policies and in such related business skills as market research, source selection, cost and price analysis, negotiation, and contract administration.

Program and project managers identify the deliverables required for their missions and perform such functions related to acquiring those deliverables as:

- Preparing acquisition plans, purchase requests, and statements of work.
- Recommending evaluation criteria and evaluating proposals from offerors (private sector firms competing for the award).
- Overseeing technical progress on a contract.
- Inspecting and accepting contract deliverables.
- Identifying the need to modify or terminate a contract.

Contracting officer representatives are designated by contracting officers and delegated limited authority for such responsibilities as monitoring contractor progress and alerting contracting officers to problems, recommending any necessary contract changes, and inspecting and accepting deliverables.

Attorneys review proposed awards for legal sufficiency, advise contracting officers on protests and disputes, and interpret acquisition law.

Competition advocates are responsible for identifying and removing barriers to competition. For this purpose, they review draft acquisition plans, statements of work, and justifications for other than full and open competition.

The Department's Office of Economic Impact and Diversity ensures that a fair portion of awards are to small, small disadvantaged, and women-owned business. The office also provides assistance and counseling to business firms.

Small business advocates:

- Recommend that a contract be set aside for competition among small businesses.
- Identify opportunities for placing contracts with firms owned by socially and economical disadvantaged persons in the "8(a)" program.
- Review offeror plans for placing subcontracts with small businesses.

Auditors and accountants perform such functions as:

- Auditing cost and pricing data provided by an offeror and recommending positions on proposed elements of cost.
- Investigating the financial responsibility of offerors.
- Auditing contractor invoices under cost-reimbursement awards.
- Reviewing contractor accounting and cost estimating systems.

SELECTION TECHNIQUES AND AWARD TYPES

Contracts

Some of the Department's more commonly used selection techniques and award types are described below.

Management and Operating Contracts. The Department's acquisition system is unique in its award of contracts for the management and operation of laboratories and certain other major facilities and sites. In fiscal year 1997 the Department spent approximately 72 percent of its obligations on these contracts. The DEAR has special provisions for the award of management and operating contracts, as well as for their administration. For example, Government-owned or controlled facilities are used; all are cost reimbursement with advance understandings negotiated in the contract for personnel costs; work is performance-based for a broad spectrum of long-term or continuing activities; contract length is typically of five years, with competitions or extensions in five-year increments; funding is through a letter of credit; the work is substantially separate from the contractor's other business but the contractor is expected to use commercial experience and practices; and the books of account are Government-owned and integrated into the Department's system of accounts.

Simplified Acquisitions. Purchases under \$100,000 may be made under simplified procedures and contract clause requirements. Over 80 percent of the Department's actions are acquired as simplified acquisitions.

Micro-purchases. Purchases below the current threshold of \$2,500 (\$2,000 for construction) may be awarded without soliciting competitive quotations if it is determined that the price is reasonable. Authority to make these purchases is often delegated to those who will be using the products or services being purchased.

Purchase Cards. Contracting officers use purchase cards themselves and may delegate to program managers and others the authority to buy products and services through purchase cards. The authority may be for purchases up to \$25,000. Awards to required sources (for example, workshops for the handicapped and blind) at all dollar levels and consideration of small businesses for purchases over \$2,500 must be made.

Other Acquisitions. For acquisitions above the simplified acquisition threshold, contracting officers use one of two methods. **Invitations for bid** require the submission of sealed bids, publicly opened, with award to the low, responsive, responsible bidder. **Negotiation** provides for publicizing and issuing a request for proposals, discussing proposals with offerors in the competitive range (those with a reasonable chance of award), and awarding based on the evaluation criteria in the solicitation. **Noncompetitive negotiations** are allowed only when they meet statutory exceptions to competition, such as urgency or lack of any other responsible source. Most of the Department's acquisitions are negotiated.

Source Evaluation Boards. Because these acquisitions are of larger dollar value (generally above \$25 million), more complex, and more sensitive, source evaluation boards follow more comprehensive procedures, documentation, and review. Source evaluation boards will generally have a senior Department employee as the source selection official, rather than the contracting officer.

Support Services. Acquisitions for support services usually receive more thorough review to ensure that the services described in the contract are performance based, to verify that the contractor does not perform a Federal function, and to avoid organizational conflicts of interest.

Financial Assistance

For **financial assistance**, where the principal purpose is to support a public purpose, contracting officers use **cooperative agreements** if substantial involvement by the Department is anticipated, and **grants** if not. The Department's involvement distinguishes these instruments, since they will have similar terms and conditions. The Department does not provide loans as part of its financial assistance activities.

ACQUISITION PROCESS

For Contracts

The acquisition process for contracts is typically divided into three phases: presolicitation, solicitation and evaluation, and contract administration.

The presolicitation phase lays the groundwork for soliciting offers and awarding a contract. In this phase, the Department performs such tasks as:

- Identifying the need for products or services and planning to meet the need.
- Preparing a statement of work to be performed.
- Committing sufficient funds to acquire the deliverable.
- Preparing purchase requests.
- Researching the market for the needed work.

In the solicitation and evaluation phase, the Department performs such tasks as:

- Determining the extent of competition for award.

- Establishing technical, price-related, and other evaluation criteria for competitive acquisitions.
- Determining the method of acquisition (invitation for bid or negotiation) and type of contract (fixed price or cost reimbursement, and appropriateness of various incentives for the contractor).
- Drafting the solicitation.
- Publicizing the proposed acquisition.
- Answering inquiries from potential offerors and conducting prebid or preproposal conferences.
- Evaluating bids or proposals based on the evaluation plan for the acquisition and the criteria in the solicitation.
- Setting the competitive range and discussing proposals with offerors.
- Determining the responsibility of the potential awardee.
- Awarding the contract.
- Responding to protests of the award by unsuccessful offerors.

In the contract administration phase, the Department performs such tasks as:

- Orienting the contractor.
- Monitoring compliance by both contractor and Government personnel with terms of the contract.
- Inspecting and accepting contract deliverables.

- If problems arise, determining whether to stop work, extend delivery dates for excusable delays, or apply formal contractual remedies (e.g., rejection of work or issuance of cure or show cause notices).
- Determining the timing and amount of payments to contractors, based on the contract terms.
- Modifying or terminating contracts, where necessary.
- Closing out the contract.
- Responding to contractor claims, if any, for additional money.

For Financial Assistance

The financial assistance process can be divided into three phases: pre-award, award, and post-award.

In the pre-award phase, the Department performs such tasks as:

- Issuing program regulations as necessary to implement authorizing legislation.
- Defining program objectives: types of projects or activities eligible for funding.
- Identifying who is eligible to participate in the program.
- Determining the amount of funds available and estimate of the number of awards.
- Developing evaluation criteria.
- Soliciting applications.
- Evaluating applications according to criteria.

- Negotiating with those selected for award.

In the award phase, the Department performs such tasks as:

- Setting up the terms and conditions of the award, including payment, reporting, disposition of program income, and patent provisions.
- Providing advance notification of award to Congress.
- Issuing the award.

In the postaward phase, the Department performs such tasks as:

- Monitoring performance and compliance through progress reports and site visits.
- Providing technical assistance as requested.
- Making payments.
- Reviewing financial status reports.
- Reviewing audit reports.
- Closing out the award.

STANDARDS OF CONDUCT

Since acquisition is a fiduciary responsibility, Government business must be conducted with complete impartiality and, except as authorized by statute or regulation, preferential treatment to none. This includes:

- Avoiding any conflict of interest or appearance of conflict or lack of impartiality.

- Avoiding making Government decisions outside official procedures or without authority.
- Conducting actions as though full public disclosure were expected.

Prohibited conduct for all personnel involved with a procurement:

- Disclosing contractor bid or proposal information or source selection information to unauthorized sources.
- Taking bribes or soliciting or accepting certain gratuities.
- Discussing future employment or business opportunities with a bidder or offeror without promptly reporting the contact in writing and executing a recusal.
- Using an official position or non-public information to advance private or personal interests.
- Participating in specific matters in which the employee; spouse; minor children; general partner; or organization in which the employee serves as an officer, director, trustee, general partner, or employee has a financial interest.
- Conspiring to defraud the Government.
- Making false statements.
- Having a financial interest in a potential offeror if the employee substantially participates in a procurement or serves as a member of a technical evaluation committee, source evaluation board, or a source selection official.
- Contracting with Government employees or members of Congress.

- Seeking or engaging in outside employment or activities with a contractor or other person whose financial interests may be affected by or conflict with the performance of your official duties.
- Engaging in certain post-employment representations to the Government and, under certain circumstances, receiving compensation from a contractor as an employee, officer, director or consultant of the contractor.

Disclosing procurement information. Contractor bid or proposal information or source selection information may not be obtained or disclosed before contract award, except as authorized by law. Source selection information includes:

- Source selection plans.
- Technical evaluation plans.
- Cost or price proposals in response to requests for proposals.
- Proposal evaluations (technical as well as those of proposed costs or prices).
- Competitive range determinations.
- Rankings of offers and offerors.
- Reports and evaluations of source selection panels, boards, and advisory councils.
- Any other data marked “Source Selection Information.”

Sanctions. Employees who engage in prohibited conduct may be subject to administrative sanctions, civil penalties, criminal fines, and/or incarceration. In addition, such conduct may result in the cancellation of the procurement or rescission of a contract, causing delays and interrupted procurements for goods and services.

PRACTICAL SUGGESTIONS

- Do not provide **advance information** (not generally made available to the public) to companies or individuals relative to planned transactions that would, in fact or appearance, provide an unfair competitive advantage. This includes not discussing acquisition-related business outside the office (“Look at the big deal I’m working on; let me tell you what we’re doing that you haven’t heard about”), at cocktail parties, social occasions, or family get-togethers —there are criminal and civil penalties for release of unauthorized information.
- Ensure the availability of **appropriated funds** to pay for an acquisition.
- Support the mandatory acquisition of products and services from non-profit agencies employing people who are **blind or severely disabled** under the Javits-Wagner-O’Day Act.
- Request the appropriate contracting officer to make **commitments to contractors**, companies, or individuals or orders/requests for them to perform work. Do not sign (execute) contractual instruments or modifications, whether or not dollars are involved, or memorandums or letters that appear to have the effect of contractually binding the Government. An agency employee who makes an unauthorized commitment may be subject to personal liability.
- Consult immediately with the Department’s ethics official and the contracting officer if you are provided information or asked to be involved in any acquisition activities for which you or you family members have **financial interests** or other holdings in a contractor, subcontractor, or potential offeror.
- Assign work to **management and operating contractors** only within their contractually-defined mission; avoid giving them work that should be performed by others in the private sector.

- As soon as an acquisition need is identified, contact the contracting officer to obtain advice and initiate early planning strategies. This is particularly important for acquisitions with urgent time requirements. Early **planning** can also significantly shorten acquisition lead times for complex, large acquisitions.
- Be knowledgeable of the **procurement integrity** requirements and other ethical considerations before discussing any acquisition with a member of the public.
- Ensure that you share **proprietary and source selection** information only with appropriate individuals having a need for the information. Use care in working with support contractors and clerical staff in the office.
- Support the **small and small disadvantaged business** programs.
- Make contractor **source selections** or attempt to influence these selections only for those you have been delegated in writing source selection official authority.
- Be an active advocate for complying with **statutory or regulatory requirements**, and in particular the requirements for **competition**. “Advance source selection” (he’s the best to do the work; he knows what we want) or urgency (I need it right away and I know someone who can give me what I want now) are not statutory exceptions to the general requirement to compete Federal acquisition requirements.
- Discuss with the appropriate contracting officer before soliciting or encouraging, orally or in writing, the submission of **unsolicited proposals**.

FOR MORE INFORMATION

1. **On how to purchase an item**, contact the account executive for the program office or, if not known, the Director, Office of Headquarters Procurement Services at 202-426-0029.
2. **On standards of conduct questions**, contact the Department's designated agency ethics official in the General Counsel's office at 202-586-1522 (Headquarters) or the local ethics official (field).
3. **On the Federal Acquisition Regulation and Department of Energy Acquisition Regulation**, contact the Office of Procurement and Assistance Policy, 202-586-8180.
4. **On the Department's acquisition training program and courses available**, contact the Office of Management Systems, at 202-586-8198.
5. **To access the Department of Energy Business Communications Center on the Internet**, describing Department acquisition activities, the address is <http://www.pr.doe.gov/prbus.html>.
6. **On the Department's Small and Disadvantaged Programs**, contact the Office of Economic Impact and Diversity's Office of Small Business, 202-586-7377.